

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

May 26, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RONELDA S.

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 2:21-CV-169-RMP

ORDER GRANTING IN PART
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND
REMANDING FOR ADDITIONAL
PROCEEDINGS

BEFORE THE COURT, without oral argument, are cross-motions for summary judgment from Plaintiff Ronelda S.¹ ECF No. 20, and Defendant the Commissioner of Social Security (the "Commissioner"), ECF No. 21. Plaintiff seeks judicial review, pursuant to 42 U.S.C. § 405(g) and 42 U.S.C. § 1383(c)(3), of the Commissioner's denial of her claim for Social Security Disability Insurance Benefits ("DIB") and Social Security Income ("SSI") under Titles II and XVI of the

¹ In the interest of protecting Plaintiff's privacy, the Court uses Plaintiff's first name and last initial.

1 Social Security Act (the “Act”). *See* ECF No. 20 at 1–2. Having considered the
2 parties’ motions, the administrative record, and the applicable law, the Court is fully
3 informed. For the reasons set forth below, the Court grants in part summary
4 judgment in favor of Plaintiff, reverses the Commissioner’s final decision, and
5 remands the matter for further administrative proceedings under sentence four of 42
6 U.S.C. § 405(g).

7 **BACKGROUND**

8 ***General Context***

9 Plaintiff was born in 1969 and applied for DIB and SSI on approximately May
10 22, 2018, alleging disability beginning on September 1, 2018. Administrative
11 Record (“AR”)² 15, 282–307. Plaintiff reported that she was suffering from
12 migraines, chronic thrush, asthma, ulcers, diverticulitis, chronic obstructive
13 pulmonary disorder, rheumatoid arthritis, depression, diabetes, high cholesterol, high
14 blood pressure, insomnia, and anxiety. AR 208. Plaintiff’s last employment was as
15 a restaurant manager until summer 2016, when she alleges that she was unable to
16 continue working due to severe back pain, locking, an inability to get up after sitting
17 down for a break, difficulty walking or standing for extended periods, and severe
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20 ² The AR is filed at ECF No. 10.

1 migraines. AR 57–59, 73. The application was denied initially and upon
2 reconsideration, and Plaintiff requested a hearing. *See* AR 140–41.

3 On August 4, 2020, Plaintiff appeared at a hearing, represented by attorney
4 Chad Hatfield, before Administrative Law Judge (“ALJ”) Jesse Shumway in
5 Spokane, Washington. AR 39–41. Due to the exigencies of the COVID-19
6 pandemic, Plaintiff and her counsel appeared telephonically. AR 41–42. The ALJ
7 also heard telephonically from vocational expert Richard Hincks and medical expert
8 Minh Vu. AR 44–79. Plaintiff, Mr. Hincks, and Dr. Vu responded to questions
9 from ALJ Shumway and counsel. AR 44–79.

10 ***ALJ’s Decision***

11 On October 9, 2020, ALJ Shumway issued an unfavorable decision. AR 15–
12 28. Applying the five-step evaluation process, ALJ Shumway found:

13 **Step one:** Plaintiff meets the insured status requirements of the Social
14 Security Act through March 31, 2022, and Plaintiff has not engaged in substantial
15 gainful activity since September 1, 2016, the alleged onset date. AR 18.

16 **Step two:** Plaintiff has the following severe impairments that are medically
17 determinable and significantly limit her ability to perform basic work activities:
18 cervical degenerative disc disease, major depressive disorder, generalized anxiety
19 disorder, and post-traumatic stress disorder, under 20 C.F.R. §§ 404.1520(c) and
20 416.920(c). AR 18. The ALJ further found that asthma, left ankle sprain, left heel
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1 fracture, hypertension, hyperlipidemia, migraines, hemorrhoids, and
2 methamphetamine abuse were non-severe impairments that would have no more
3 than a minimal effect on Plaintiff's ability to perform basic work activities.

4 AR 18. The ALJ found that Plaintiff's alleged bipolar disorder, rheumatoid arthritis,
5 low back pain, and atypical chest pain were not medically determinable impairments
6 given the lack of objective evidence. AR 19.

7 **Step three:** The ALJ concluded that Plaintiff does not have an impairment or
8 combination of impairments that meets or medically equals the severity of one of the
9 listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 C.F.R.
10 404.1520(d), 404.1525, 404.1526(d), 416.920(d), 416.925, and 416.926). AR 19.

11 **Residual Functional Capacity ("RFC"):** The ALJ found that Plaintiff had
12 the RFC to: perform light work as defined in 20 CFR 404.1567(b) and 416.967(b)
13 except that she can never climb ladders, ropes, or scaffolds. She cannot have
14 concentrated exposure to pulmonary irritants. She cannot tolerate exposure to
15 hazards, such as unprotected heights and moving mechanical parts. She is limited to
16 simple, routine tasks. She can have no contact with the public. She can have
17 superficial contact with coworkers. She requires a routine, predictable work
18 environment with no more than occasional changes. AR 21.

19 In determining Plaintiff's RFC, the ALJ found that Plaintiff's statements
20 concerning the intensity, persistence, and limiting effects of her alleged symptoms
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1 “are not entirely consistent with the medical evidence and other evidence in the
2 record” for several reasons that the ALJ discussed. AR 21.

3 **Step four:** The ALJ found that Plaintiff has past relevant work as a landscaper
4 (medium, semi-skilled work with a Specific Vocational Preparation (“SVP”) of 3),
5 as a cashier (light, unskilled work with an SVP of 2), and as a sorter (light, unskilled
6 work with an SVP of 2). AR 26. The ALJ relied on the VE’s testimony to find that
7 Plaintiff is unable to perform her past relevant work as actually or generally
8 performed. AR 26.

9 **Step five:** The ALJ found that Plaintiff has a high school education; was 46
10 years old on her alleged disability onset date, which is defined as a younger
11 individual (age 18-49); and that transferability of job skills is not material to the
12 determination of disability because the application of the Medical-Vocational
13 Guidelines to Plaintiff’s case supports a finding that Plaintiff is “not disabled,”
14 whether or not Plaintiff has transferable job skills. AR 26. The ALJ found that there
15 are jobs that exist in significant numbers in the national economy that Plaintiff can
16 perform considering her age, education, work experience, and RFC. AR 26–27.
17 Specifically, the ALJ recounted that the VE identified the following representative
18 occupations that Plaintiff would be able perform with the RFC: Pricer (light,
19 unskilled work with an SVP of 2); Hand Packager/Inspector (light, unskilled work
20 with an SVP of 2); and Office Helper (light, unskilled work with an SVP of 2). AR
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1 27. The ALJ concluded that Plaintiff had not been disabled within the meaning of
2 the Social Security Act at any time from September 5, 2018, through the date of the
3 ALJ's decision. AR 27.

4 The Appeals Council denied review. AR 1–6.

5 **LEGAL STANDARD**

6 ***Standard of Review***

7 Congress has provided a limited scope of judicial review of the
8 Commissioner's decision. 42 U.S.C. § 405(g). A court may set aside the
9 Commissioner's denial of benefits only if the ALJ's determination was based on
10 legal error or not supported by substantial evidence. *See Jones v. Heckler*, 760 F.2d
11 993, 995 (9th Cir. 1985) (citing 42 U.S.C. § 405(g)). "The [Commissioner's]
12 determination that a claimant is not disabled will be upheld if the findings of fact are
13 supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir.
14 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla,
15 but less than a preponderance. *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10
16 (9th Cir. 1975); *McCallister v. Sullivan*, 888 F.2d 599, 601–02 (9th Cir. 1989).
17 Substantial evidence "means such evidence as a reasonable mind might accept as
18 adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
19 (citations omitted). "[S]uch inferences and conclusions as the [Commissioner] may
20 reasonably draw from the evidence" also will be upheld. *Mark v. Celebrezze*, 348

1 F.2d 289, 293 (9th Cir. 1965). On review, the court considers the record as a whole,
2 not just the evidence supporting the decisions of the Commissioner. *Weetman v.*
3 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989).

4 A decision supported by substantial evidence still will be set aside if the
5 proper legal standards were not applied in weighing the evidence and making a
6 decision. *Browner v. Sec’y of Health and Human Servs.*, 839 F.2d 432, 433 (9th Cir.
7 1988). Thus, if there is substantial evidence to support the administrative findings,
8 or if there is conflicting evidence that will support a finding of either disability or
9 nondisability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*,
10 812 F.2d 1226, 1229–30 (9th Cir. 1987).

11 ***Definition of Disability***

12 The Social Security Act defines “disability” as the “inability to engage in any
13 substantial gainful activity by reason of any medically determinable physical or
14 mental impairment which can be expected to result in death or which has lasted or
15 can be expected to last for a continuous period of not less than 12 months.” 42
16 U.S.C. §§ 423(d)(1)(A). The Act also provides that a claimant shall be determined
17 to be under a disability only if her impairments are of such severity that the claimant
18 is not only unable to do her previous work, but cannot, considering the claimant’s
19 age, education, and work experiences, engage in any other substantial gainful work
20 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A). Thus, the
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1 definition of disability consists of both medical and vocational components. *Edlund*
2 *v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

3 ***Sequential Evaluation Process***

4 The Commissioner has established a five-step sequential evaluation process
5 for determining whether a claimant is disabled. 20 C.F.R. §§ 416.920, 404.1520.
6 Step one determines if he is engaged in substantial gainful activities. If the claimant
7 is engaged in substantial gainful activities, benefits are denied. 20 C.F.R. §§
8 416.920(a)(4)(i), 404.1520(a)(4)(i).

9 If the claimant is not engaged in substantial gainful activities, the decision
10 maker proceeds to step two and determines whether the claimant has a medically
11 severe impairment or combination of impairments. 20 C.F.R. §§ 416.920(a)(4)(ii),
12 404.1520(a)(4)(ii). If the claimant does not have a severe impairment or combination
13 of impairments, the disability claim is denied.

14 If the impairment is severe, the evaluation proceeds to the third step, which
15 compares the claimant's impairment with listed impairments acknowledged by the
16 Commissioner to be so severe as to preclude any gainful activity. 20 C.F.R. §§
17 416.920(a)(4)(iii), 404.1520(a)(4)(iii); *see also* 20 C.F.R. § 404, Subpt. P, App. 1. If
18 the impairment meets or equals one of the listed impairments, the claimant is
19 conclusively presumed to be disabled.

1 If the impairment is not one conclusively presumed to be disabling, the
2 evaluation proceeds to the fourth step, which determines whether the impairment
3 prevents the claimant from performing work that he has performed in the past. If the
4 claimant can perform her previous work, the claimant is not disabled. 20 C.F.R. §§
5 416.920(a)(4)(iv), 404.1520(a)(4)(iv). At this step, the claimant's RFC assessment
6 is considered.

7 If the claimant cannot perform this work, the fifth and final step in the process
8 determines whether the claimant is able to perform other work in the national
9 economy considering her residual functional capacity and age, education, and past
10 work experience. 20 C.F.R. §§ 416.920(a)(4)(v), 404.1520(a)(4)(v); *Bowen v.*
11 *Yuckert*, 482 U.S. 137, 142 (1987).

12 The initial burden of proof rests upon the claimant to establish a prima facie
13 case of entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th
14 Cir. 1971); *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden
15 is met once the claimant establishes that a physical or mental impairment prevents
16 him from engaging in her previous occupation. *Meanel*, 172 F.3d at 1113. The
17 burden then shifts, at step five, to the Commissioner to show that (1) the claimant
18 can perform other substantial gainful activity, and (2) a "significant number of jobs
19 exist in the national economy" which the claimant can perform. *Kail v. Heckler*, 722
20 F.2d 1496, 1498 (9th Cir. 1984).

ISSUES ON APPEAL

The parties' motions raise the following issues regarding the ALJ's decision:

1. Did the ALJ erroneously assess five of the competing medical opinions?
2. Did the ALJ erroneously evaluate the severity of Plaintiff's conditions?
3. Did the ALJ erroneously determine that Plaintiff's impairments were not of Listing-level severity?
4. Did the ALJ erroneously assess Plaintiff's subjective symptom complaints?
5. Did the ALJ err in formulating the RFC and making vocational findings at Step Five?

Medical Opinion Testimony

Plaintiff argues that the ALJ erred in his evaluation of five medical opinions, from Minh Vu, MD; Carmen Stolte, NP; Aaron Burdge, PhD; NK Marks, PhD; and Patrick Metoyer, PhD. The Commissioner contends that the ALJ reasonably evaluated eight competing medical opinions before him, including from the five medical sources raised by Plaintiff in her Motion for Summary Judgment, and that the ALJ's failure to address Dr. Burdge's medical opinion was harmless error. ECF No. 21 at 3.

1 The regulations that took effect on March 27, 2017, provide a new framework
2 for the ALJ's consideration of medical opinion evidence and require the ALJ to
3 articulate how persuasive he finds all medical opinions in the record, without any
4 hierarchy of weight afforded to different medical sources. *See* Rules Regarding the
5 Evaluation of Medical Evidence, 82 Fed. Reg. 5844-01, 2017 WL 168819 (Jan. 18,
6 2017); 20 C.F.R. § 404.1520c. Instead, for each source of a medical opinion, the
7 ALJ must consider several factors, including supportability, consistency, the
8 source's relationship with the claimant, any specialization of the source, and other
9 factors such as the source's familiarity with other evidence in the claim or an
10 understanding of Social Security's disability program. 20 C.F.R. § 404.1520c(c).

11 Supportability and consistency are the "most important" factors, and the ALJ
12 must articulate how he considered those factors in determining the persuasiveness of
13 each medical opinion or prior administrative medical finding. 20 C.F.R. §
14 404.1520c(b)(2). With respect to these two factors, the regulations provide that an
15 opinion is more persuasive in relation to how "relevant the objective medical
16 evidence and supporting explanations presented" and how "consistent" with
17 evidence from other sources the medical opinion is. 20 C.F.R. § 404.1520c(c)(1).
18 The ALJ may explain how he considered the other factors, but is not required to do
19 so, except in cases where two or more opinions are equally well-supported and
20 consistent with the record. 20 C.F.R. § 404.1520c(b)(2), (3). Courts also must
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1 continue to consider whether the ALJ's finding is supported by substantial evidence.
2 *See* 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to
3 any fact, if supported by substantial evidence, shall be conclusive . . .").

4 Prior to issuance of the new regulations, the Ninth Circuit required an ALJ to
5 provide clear and convincing reasons to reject an uncontradicted treating or
6 examining physician's opinion and provide specific and legitimate reasons where the
7 record contains a contradictory opinion. *See Revels v. Berryhill*, 874 F.3d 648, 654
8 (9th Cir. 2017). One month ago, the Ninth Circuit held that the Social Security
9 regulations revised in March 2017 are "clearly irreconcilable with [past Ninth
10 Circuit] caselaw according special deference to the opinions of treating and
11 examining physicians on account of their relationship with the claimant." *Woods v.*
12 *Kijakazi*, No. 21-35458, 2022 U.S. App. LEXIS 10977, at *14 (9th Cir. Apr. 22,
13 2022). The Ninth Circuit continued that the "requirement that ALJs provide
14 'specific and legitimate reasons' for rejecting a treating or examining doctor's
15 opinion, which stems from the special weight given to such opinions, is likewise
16 incompatible with the revised regulations." *Id.* at *15 (internal citation omitted).

17 Accordingly, as Plaintiff's claim was filed after the new regulations took
18 effect, the Court refers to the standard and considerations set forth by the revised
19 rules for evaluating medical evidence. *See* AR 15.

20 / / /

1 Minh Vu, MD

2 Plaintiff argues that the ALJ “inexplicably adopted the clearly erroneous
3 testimony of physical medial expert Dr. Vu.” ECF No. 20 at 8. Plaintiff asserts that
4 Dr. Vu should have considered examination findings from physical therapists and
5 ignored Plaintiff’s loss of strength and sensation resulting from cervical
6 radiculopathy, even when Plaintiff’s counsel pointed out Dr. Vu’s “inaccuracies” to
7 him. *Id.* Plaintiff continues that objective findings in the record contradict Dr. Vu’s
8 testimony and argues that, consequently, “the ALJ’s reliance on the incorrect
9 testimony of Dr. Vu was not supported by substantial evidence.” *Id.* at 9–10 (citing
10 AR 868, 870, 921, and 926).

11 The Commissioner responds that Plaintiff’s “alternative interpretation of the
12 record evidence has no bearing on the persuasive value of Dr. Vu’s opinion.” ECF
13 No. 21 at 6 (citing *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005), for the
14 proposition that courts should uphold the ALJ’s decision when the evidence is
15 susceptible to more than one rational interpretation).

16 Plaintiff replies that the Commissioner has not supported her assertion that Dr.
17 Vu adequately reviewed the entire longitudinal record or that his testimony was
18 supported by a mostly unremarkable record. ECF No. 22 at 4. Rather, Plaintiff
19 argues, Dr. Vu’s testimony “lacked any supporting factual basis, and the ALJ’s
20 reliance on this incorrect testimony poisoned the entire decision.” *Id.*

1 Dr. Vu testified as a medical expert at Plaintiff's administrative hearing and
2 stated that he had reviewed Plaintiff's entire medical record in the administrative
3 file. AR 44. Dr. Vu testified that Plaintiff has a cervical spinal disease but does not
4 have any neuromuscular deficits or compression of any nerve roots. AR 44. Dr. Vu
5 characterized the record as showing that Plaintiff's left heel fracture is healing and
6 did not have a 12-month duration by the time of the hearing. AR 45. With respect
7 to Plaintiff's claimed diagnosis of COPD, Dr. Vu reported that he did not find any
8 spirometry to study it and that he concluded that the condition was "not very
9 severe." AR 45. Dr. Vu continued that Plaintiff's hypertension "has no
10 complications," such as a kidney, heart, or eye problem or abnormal creatinine
11 levels. AR 45. Dr. Vu testified that with respect to Plaintiff's complaint of
12 migraines, he did not find that her file indicated "any organic problem with the
13 central nervous system." AR 45. Dr. Vu concluded that Plaintiff's cervical spine
14 problem was her only severe impairment. AR 45. Dr. Vu discussed whether
15 Plaintiff qualified for any Listing and concluded that she did not. AR 48. Dr. Vu
16 further opined as to workplace restrictions and testified that "giving maximum credit
17 to [Plaintiff's complaints of] pain [he] would restrict her to a full range of light."
18 AR 48–49. Dr. Vu continued that he found that the record supported environmental
19 restrictions for Plaintiff, including no climbing ropes, no working around moving
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1 equipment and avoiding concentrated levels of air pollution because of the
2 complaint of the COPD.

3 Plaintiff's counsel asked Dr. Vu about whether he had evaluated an October
4 2018 physical therapy treatment record showing testing regarding Plaintiff's muscle
5 strength and range of motion. AR 50 (citing AR 868–69). Dr. Vu indicated that he
6 had reviewed the record and determined that the findings of the physical therapist
7 were “not really consistent with the physical findings by an MD anywhere in the
8 file” or even with the physical therapist's own findings. AR 50–51. Dr. Vu
9 indicated that the record contained findings that Plaintiff was “independent and
10 complaint [sic] [INAUDIBLE] percent of the time. Demonstrated cervical active
11 range of motion 75 degrees. Grip strength at least 5/5 and that's very strong, that's
12 normal. Number 4, perform routine ADL, activities of daily living, and recreation
13 activities without limiting.” AR 51. Plaintiff's counsel pointed out, and Dr. Vu
14 acknowledged, that Dr. Vu was reading “goals” set forth in the record, rather than
15 examination findings. AR 51. Plaintiff's counsel also asked Dr. Vu to comment on
16 the findings in the physical therapy treatment record of marked muscle atrophy, a
17 marked decreased strength in the C5-C6 level, a 4-out-of-5 rapid onset of fatigue
18 with repeated testing, and a decreased range of motion in Plaintiff's left shoulder.
19 AR 51. Dr. Vu responded that he didn't think that the physical therapist who created
20 the record was “qualified to do physical exams for SSA . . . [was] not a physician
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1 and the finding is not consistent with the remaining medical records.” AR 52.

2 Plaintiff’s counsel asked Dr. Vu to review a December 2018 record from a treating
3 physician finding that Plaintiff had decreased grip strength on the left, sudden
4 weakness and numbness, and decreased sensation in “all the same areas” noted by
5 the physical therapist. AR 52 (discussing AR 921–22). Dr. Vu responded that he did
6 not think that Plaintiff had any significant loss of the strength, and his opinion was
7 not altered by what Plaintiff’s counsel had shown him. AR 52.

8 The ALJ found Dr. Vu’s opinion persuasive as follows:

9 Medical expert Minh Vu, M.D. reported that the claimant could
10 perform light work with postural and environmental limitations
11 (Hearing). As a medical expert, Dr. Vu was able to support his opinion
12 with detailed testimony regarding the evidence used to formulate it. He
13 is the only medical source who reviewed the entire longitudinal medical
14 record, as constituted at the time of the hearing, and he is the only
15 medical source who was available to explain his opinion at the hearing
and respond to questioning from myself and the claimant’s
representative. I find his opinion is consistent with the evidence of
record, including the claimant’s treating provider’s report that she
showed full strength in all extremities despite pain. Based on his
analysis and the significant indicia of reliability that accompany it, Dr.
Vu’s opinion is persuasive.

16 AR 25.

17 Dr. Vu testified that an October 30, 2018 physical therapy treatment
18 record supported that Plaintiff has “cervical active range of motion 75
19 degrees” and “grip strength at least 5/5,” and is able to perform routine
20 activities of daily living and recreational activities without limiting neck and
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1 shoulder pain or weakness. AR 51. However, the treatment record listed
2 those capabilities as goals, not findings. AR 868. The ALJ repeated Dr.
3 Vu's mischaracterization by finding Dr. Vu's opinion "consistent with the
4 evidence of record, including the claimant's treating provider's report that
5 she showed full strength in all extremities despite pain." AR 25.³

6 Plaintiff has shown that Dr. Vu's characterization of the medical
7 record was inaccurate, and the ALJ accepted that inaccurate characterization,
8 even though it was not supported by substantial evidence. Under the new
9 regulations addressing the treatment of medical opinion evidence, courts still
10 must determine whether the agency's findings were based on substantial
11 evidence. *See* 42 U.S.C. § 405(g). The Court finds that the ALJ erred by
12 basing his analysis of Dr. Vu's opinions on an inaccurate representation of
13 the record.

14 Carmen Stolte, NP

15 Plaintiff argues that the ALJ erred in evaluating the July 2020 of Plaintiff's
16 primary care provider, Ms. Stolte, by failing to address Ms. Stolte's opinions about
17 absenteeism, off-task behavior, and a need to lie down throughout the day, ignoring
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19 ³ The ALJ cited to page "17" of the physical therapy treatment record exhibit, but
20 the record contains only four pages. *Compare* AR 25 (citing "Ex. 22F/17") *with*
21 AR 868–71 (Ex. 22F).

1 that the record supports that Plaintiff requires cervical surgery, and overlooking
2 Plaintiff's migraine headaches. ECF No. 20 at 10. Plaintiff argues that the ALJ also
3 was wrong to find Ms. Stolte's 2020 opinion inconsistent with her 2018 opinion
4 because Ms. Stolte wrote the 2020 opinion after relevant imaging and examination
5 findings. *Id.* (citing AR 769–71). Plaintiff maintains that the ALJ's assessment of
6 Ms. Stolte's 2020 opinions was conclusory and "little more than substituting his own
7 lay opinion for Nurse Stolte's professional expertise and 15-year treating
8 relationship with the claimant." ECF No. 22 at 5–6.

9 The Commissioner responds that the ALJ's analysis of the supportability and
10 consistency of Ms. Stolte's opinion was proper and well-supported. ECF No. 21 at
11 7.

12 Ms. Stolte opined in June 2018 that Plaintiff is capable of performing no more
13 than light work. AR 771. Ms. Stolte completed a second medical report for Plaintiff
14 in July 2020 and opined that Plaintiff is "unable to perform the demands of even
15 sedentary work." AR 989. Ms. Stolte further opined that based on the cumulative
16 effect of all of Plaintiff's limitations, including frequent headaches, chronic low
17 back pain, and anxiety, Plaintiff is likely to be off-task approximately 21-30% of a
18 40-hour workweek and would miss four days or more on average per month. AR
19 989–90. Ms. Stolte indicated on the 2020 form that she began treating Plaintiff in
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1 August 2006 and that Plaintiff's conditions existed "prior to establishing care" with
2 Ms. Stolte. AR 988, 990.

3 The ALJ found Ms. Stolte's 2018 opinion "somewhat persuasive" and her
4 2020 opinion "not persuasive" as follows:

5 Treating provider Carmen Stolte, NP reported that the claimant could
6 perform light work. This provider did not support her assessment with
7 objective findings, as she merely filled out a check-box form. However,
8 in general, the evidence of record is consistent with a limitation to light
9 work because magnetic resonance imaging (MRI) showed degenerative
10 changes in the claimant's cervical spine. For these reasons, the above
11 opinion is somewhat persuasive. In 2020, Carmen Stolte reported that
12 the claimant could not even perform sedentary work. This opinion is
13 not generally supported by objective findings, as Ms. Stolte merely
14 noted that the claimant experienced joint and back pain, without
15 reference to objective testing. Importantly, the other evidence of record
16 is inconsistent with a finding that the claimant was able to perform light
17 work until 2020, when this provider reported that she could not perform
18 even sedentary work. For example, in May of 2020, the claimant
19 showed normal gait, station, and head/neck mobility (Ex. 35F/4). As
20 such, the above opinion is not persuasive.

21 AR 25.

As Plaintiff contends, the ALJ addressed only one of the opinions that Ms.
Stolte expressed in the 2020 report, that Plaintiff cannot perform even sedentary
work, and not the remaining opinions regarding likely absenteeism and need to lay
down for portions of the day. AR 25, 988–90. Moreover, the ALJ's consideration
of the supportability and consistency of Ms. Stolte's opinion is conclusory and fails
to adequately explain why the ALJ found the opinion of Plaintiff's longtime
treatment provider to be unpersuasive. *See Tina T. v. Comm'r of Social Security*,

2020 WL 4259863, at *4 (W.D. Wash. July 24, 2020)). Therefore, the Court finds that the ALJ erred in his evaluation of Ms. Stolte's opinions.

NK Marks, PhD

Plaintiff maintains that Dr. Marks's observations and findings, as well as the greater record, contradict the ALJ's "bare assertion" that Dr. Marks's opinion was not supported by the largely unremarkable findings. ECF No. 22 at 7. Specifically, Plaintiff maintains that Dr. Marks supported her opinion with objective clinical interview and mental status findings: "(1) severe depression symptoms; (2) severe anxiety symptoms; (3) PTSD, with physical abuse by her ex-husband directed at her and their children, stalking, threatening, and severe beatings, with ongoing fear and trauma-based symptoms in the severe range; (4) poorly organized speech; (5) zero eye contact, with behavior characterized by crying and rocking back and forth; (6) anxious and depressed mood, with agitated affect; (7) poor working memory; (8) fund of knowledge not within normal limits; and (9) abstract thought not within normal limits." *Id.* at 7 (citing AR 764–68).

The Commissioner responds that "Plaintiff's request for an alternative interpretation of Dr. Marks's opinion should fail under the substantial evidence standard." ECF No. 21 at 9–10. The Commissioner continues that the ALJ properly analyzed the supportability and consistency of Dr. Marks's opinion. *Id.* at 10.

1 Dr. Marks conducted a mental status examination and psychological
2 evaluation of Plaintiff for the Washington State Department of Social and Health
3 Services (“DSHS”) in June 2018. AR 762–66. Dr. Marks made clinical findings of
4 particular symptoms placing Plaintiff in the severe range of depression, anxiety, and
5 PTSD. AR 764. Dr. Marks ultimately assessed marked to severe limitations in ten
6 basic work activities and an overall marked severity rating based on the combined
7 impact of all diagnosed mental impairments. AR 765.

8 The ALJ found that Dr. Marks’s opinion “is not supported by his/her own
9 objective findings, as she/he reported that the claimant was cooperative, could recall
10 items immediately and follow simple directions, and had normal insight and
11 judgment.” AR 25 (citing AR 767–68). The ALJ continued, “Further, the other
12 evidence of record is inconsistent with the restrictive limitations reported by Dr.
13 Marks because another examiner reported that the claimant was able to complete
14 serial 3 testing, with only mildly impaired remote memory and with intact judgment
15 and insight. As such Dr. Marks’ assessment is unpersuasive.” AR 25 (citing AR
16 996–97).

17 The ALJ based his treatment of Dr. Marks’s opinions on his observation that
18 her objective findings regarding Plaintiff were unremarkable. AR 25. However, Dr.
19 Marks noted both normal and abnormal findings in the mental status examination
20 portion of the form. AR 766–67. While Dr. Marks recorded Plaintiff’s attitude as
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1 cooperative, she also noted that Plaintiff made “[z]ero eye contact the entire time”
2 and “[c]ried, rocked back and forth.” AR 766–67. Dr. Marks noted that Plaintiff
3 had a “depressed” and “anxious” mood and an “agitated” and “full range” affect.
4 AR 767. In addition, while noting that Plaintiff’s orientation and perception were
5 within normal limits, Dr. Marks found Plaintiff’s fund of knowledge and abstract
6 thought to be below normal limits. AR 767–68. The ALJ’s only other reasoning
7 was that Dr. Marks’s findings were in conflict with the findings of one other
8 examiner. AR 25.

9 The Court does not find substantial evidence to support the ALJ’s treatment of
10 Dr. Marks’s opinion, and, therefore, finds error with respect to this medical source
11 opinion.

12 Aaron Burdge, PhD

13 Plaintiff argues that the ALJ erred in failing to address Dr. Burdge’s July 2018
14 opinion that Plaintiff is severely limited in eight basic work activities. ECF No. 22
15 at 6.

16 The Commissioner responds that the ALJ’s oversight in not addressing Dr.
17 Burdge’s opinion in the decision “does not warrant remand because Dr. Burdge’s
18 opinion is both incomplete—in that it fails to address relevant questions about the
19 basis and duration of Plaintiff’s functional limitations—and is essentially identical to
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1 Dr. Marks's opinion, which the ALJ properly considered and found unpersuasive.”
2 ECF No. 21 at 11.

3 Dr. Burdge conducted a review of the medical evidence for DSHS on July 5,
4 2018, and assessed Plaintiff as being markedly limited in three work-related abilities
5 and severely limited eight other work-related ability categories. AR 811. Dr.
6 Burdge did not respond to all of the questions on the DSHS form.

7 The Ninth Circuit has noted that the failure to address a relevant medical
8 opinion can be consequential to the ALJ's ultimate decision. *Marsh v. Colvin*, 792
9 F.3d 1170, 1173 (9th Cir. 2015) (holding that a failure to address a medical opinion
10 was reversible error).

11 The ALJ's decision did not address Dr. Burdge's opinion. *See* AR 15–28.
12 Therefore, the Court cannot evaluate whether the ALJ provided sufficient reasons
13 for Dr. Burdge's opinion, and, to the extent that Dr. Burdge's opinion mirrors that of
14 Dr. Marks, the Court already found that the ALJ erred with respect to his evaluation
15 of Dr. Marks's opinion, and that conclusion also supports finding error with respect
16 to treatment of Dr. Burdge's opinion.

17 Patrick Metoyer, PhD

18 Plaintiff argues that the ALJ's treatment of Dr. Metoyer's July 2020
19 evaluation of Plaintiff is not supported by substantial evidence. ECF No. 22 at 8.
20 Plaintiff continues that Dr. Metoyer's examination noted symptoms that confirm his
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1 disabling opinion, including anxiety and PTSD symptoms of marked severity and
2 daily frequency, and depressed bipolar symptoms of moderate to marked severity
3 and daily frequency. *Id.* at 8–9.

4 The Commissioner responds that the ALJ properly analyzed the supportability
5 and consistency of Dr. Metoyer’s opinion, and the Commissioner argues that the
6 Court should reject Plaintiff’s request for an alternative interpretation of this opinion
7 and sustain the ALJ’s analysis. ECF No. 21 at 9.

8 Dr. Metoyer conducted a mental status examination and psychological
9 evaluation of Plaintiff for DSHS on July 6, 2020. AR 991–97. He assessed
10 moderate to marked limitations in ten basic work activities and an overall severity
11 rating of moderate. AR 995.

12 The ALJ found Dr. Metoyer’s opinion to be not persuasive because his
13 “opinion is not supported by his own objective findings, as he noted that the
14 claimant could complete serial 3 testing, was cooperative, had only mildly impaired
15 remote memory, and showed intact judgment and insight.” AR 25 (citing AR
16 996–97). The ALJ continued that “[i]n addition, the other evidence of record is
17 inconsistent with a finding that the claimant has more than moderate mental
18 limitations because a prior psychological examiner noted that the claimant could
19 recall items immediately, could follow simple directions, was cooperative, and
20 showed normal insight and judgment.” AR 25 (citing AR 767–68).

1 The ALJ first relied on Dr. Metoyer’s own findings to discount his opinion.
2 AR 25. However, the ALJ handpicked among normal and abnormal findings, and in
3 addition to finding Plaintiff cooperative and displaying intact judgment and insight,
4 Dr. Metoyer also found her to display an “anxious-depressed mood through the
5 evaluation” and having a “dysphoric” affect. AR 997. The ALJ next relied on Dr.
6 Marks’s observations, which the Court already noted included several remarkable
7 findings. AR 25 (citing AR 767–68). Therefore, the Court does not find substantial
8 evidence to support the ALJ’s reasons for discounting Dr. Metoyer’s opinion and
9 concludes that the ALJ erred in his treatment of Dr. Metoyer’s opinion.

10 ***Harmless or Reversible Error***

11 Having found that the ALJ erred in his treatment of five of the medical
12 opinions in the record, the Court turns to whether the error is reversible or harmless
13 in nature. “Even when the ALJ commits legal error, [courts] uphold the decision
14 where that error is harmless, meaning that it is inconsequential to the ultimate
15 nondisability determination, or that, despite the legal error, the agency’s path may
16 reasonably be discerned, even if the agency explains its decision with less than ideal
17 clarity.” *Brown-Hunter v. Colvin*, 806 F.3d 487, 492 (9th Cir. 2015) (internal
18 quotation marks omitted).

19 Plaintiff did not challenge the ALJ’s treatment of the opinions of two state
20 agency medical consultants, Norman Staley, M.D. and Greg Saue, M.D., and two
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1 state agency psychological consultants, Michael Regents Ph.D. and Eugene Kester,
2 M.D., which the ALJ found persuasive. *See* AR 24. Those medical consultants
3 opined that Plaintiff could perform light work with postural, manipulative, and
4 environmental limitations, and the psychological consultants opined that Plaintiff
5 could understand, remember, and carry out simple instructions and simple, routine
6 tasks, have superficial exchanges with coworkers, manage a predictable routine with
7 infrequent changes, but could not work with the public. *See* AR 24. If found
8 persuasive, the five challenged medical source opinions may have altered the RFC
9 formulated by the ALJ. Consequently, the Court cannot determine that the ALJ's
10 treatment of those opinions was harmless. Accordingly, the Court concludes that the
11 ALJ reversibly erred by failing to address medical opinions that may have supported
12 a more restrictive RFC.

13 ***Remedy***

14 Upon identifying a legal error, a reviewing court has discretion to remand an
15 action for further proceedings or for a finding of disability and an immediate award
16 of benefits. *See Harman v. Apfel*, 211 F.3d 1172, 1175–79 (9th Cir. 2000); *Benecke*
17 *v. Barnhart*, 379 F.3d 587, 593 (9th Cir. 2004). Where no useful purpose would be
18 served by further administrative proceedings, or where the record has been fully
19 developed, it is appropriate to exercise this discretion to direct an immediate award
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1 of benefits. *See Harman*, 211 F.3d at 1179 (noting that “the decision of whether to
2 remand for further proceedings turns upon the likely utility of such proceedings”).

3 However, a remand is appropriate where there are outstanding issues that must
4 be resolved before a determination of disability can be made and it is not clear from
5 the record that the ALJ would be required to find the claimant disabled if all the
6 evidence were properly evaluated. *See Bunnell v. Barnhart*, 336 F.3d 1112,
7 1115–16 (9th Cir. 2003); *see also Garrison*, 759 F.3d at 1021 (explaining that courts
8 have “flexibility to remand for further proceedings when the record as a whole
9 creates serious doubt as to whether the claimant is, in fact, disabled within the
10 meaning of the Social Security Act.”).

11 It is not clear from the record here that the ALJ would be required to find
12 Plaintiff disabled if all evidence were properly evaluated. There may be valid
13 reasons to discount the medical opinions at issue that the ALJ did not articulate. *See*
14 AR 810–12 (containing blank portions of Dr. Burdge’s Review of Medical Evidence
15 form). The Court also does not find that Plaintiff has shown that a remand for award
16 of benefits is compelled by the record, and the record contains conflicts and
17 inconsistencies in Plaintiff’s complaints that should be resolved by an ALJ. *See* AR
18 21–24. Therefore, remand is appropriate for the ALJ to consider the medical and
19 mental health opinions properly. Because this case must be remanded based upon
20 the issues discussed above, the Court does not reach Plaintiff’s other assignments of
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1 error. However, the ALJ may consider those assignments of error in the context of a
2 new sequential analysis that reconsiders the medical source opinions in this case.

3 Accordingly, **IT IS HEREBY ORDERED** that:

- 4 1. Plaintiff's Motion for Summary Judgment, **ECF No. 20**, is **GRANTED**
5 **IN PART** with respect to reversal of the Commissioner's final decision
6 and **DENIED IN PART** with respect to remanding for an award of
7 benefits.
- 8 2. Defendant's Motion for Summary Judgment, **ECF No. 21**, is **DENIED**.
- 9 3. For the reasons stated above, the decision of the Commissioner is
10 **REVERSED**, and this action is **REMANDED** for further proceedings
11 pursuant to sentence four of 42 U.S.C. § 405(g).
- 12 4. The District Court Clerk shall enter judgment in favor Plaintiff.

13 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
14 Order, enter judgment as directed, provide copies to counsel, and **close the file** in
15 this case.

16 **DATED** May 26, 2022.

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18 s/ Rosanna Malouf Peterson
19 ROSANNA MALOUF PETERSON
20 Senior United States District Judge
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